

“Shareholder Rights and Proxy Access”
Senator Jack Reed, RI
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Today we are holding a hearing on “Shareholder Rights and Proxy Access.”

In July, in an unprecedented move, the Commission issued two distinct, incongruous proposals regarding proxy access for shareholders. The first proposal, known as the short rule, would eliminate shareholder access to the proxy. The second proposal referred to as the long rule, would allow for it but places what many investor groups and large institutional investors believe are untenable thresholds and excessive hurdles. These proposals were released by the Commission at a time when there was a full complement of five commissioners with the Chairman supporting each of the distinct proposals. When the comment period ended on October 2, 2007, the SEC had received over 34,000 comment letters on the propose rules.

I am deeply concerned both about the process for approving these proposals as well as the substance of the proposals themselves. On November 1, 2007, I joined Chairman Dodd and seven of my colleagues from this Committee in sending a letter to the Commission asking it to refrain from adopting either one of the proposals and rather allow shareholders to make proposals pursuant to current standards set forth in the decision of the United States Circuit Court of Appeals for the Second Circuit in *AFSCME v. AIG*. This hearing is an opportunity to discuss shareholder rights, the significance of proxy access to shareholders, the Commission’s two proposed rules, their impact on investors and the Commission’s decision-making process.

According to the 2006 Interim Report of the Committee on Capital Markets Regulations, “the strength of shareholder rights in publicly traded firms directly affects the health and efficient functioning of U.S. capital markets. Overall, shareholders of U.S. companies have fewer rights in a number of important areas than do foreign companies. This difference creates an important potential competitive problem...Without adequate shareholder rights, rational investors will reduce the price at which they are willing to purchase shares...public capital markets will be smaller as a result of inadequate shareholder rights...The importance of shareholders rights also affects whether directors and management are fully accountable to shareholders for their actions.” The report further concludes that “there is a danger that U.S. compared with other countries, is falling behind best practices in shareholder rights.” These findings are further supported by some of the largest global institutional investors, such as Hermes, Barclays Global Investments and Universities Superannuation Scheme who have written over the past year to the Commission and to our Committee with similar concerns.

I know that the Commission takes the issue of U.S. capital markets competitiveness seriously and is prioritizing a number of efforts on that front; however, I believe that both of its proposals on shareholder access miss the mark. The short proposal would overrule the 2006 *AFSCME v. AIG* court decision and maintain that a company may exclude a proxy access proposal from its proxy materials. This clearly would take away the

fundamental rights of shareholders to have any say in the election of directors unless they filed a separate proxy.

The long proposal in theory allows shareholders access to proxies, but it sets a 5% ownership threshold which, according to some of the largest institutional investors, would make any subsequent rule meaningless in its application. As a matter of fact, research completed by the Council on Institutional Investors found that if CalPERS and nine of the other largest public pension funds were to successfully aggregate their holdings of a single public company's securities, those funds combined would likely be unable to clear the five percent threshold. Furthermore, many investors have commented that the proposed disclosure requirements under the long proposal are excessive and as Commissioner Nazareth recently commented they "are more extensive than that required of someone seeking to take over the company."

Mr. Chairman, in some press reports you have indicated that the Commission plans to finalize the "short rule" non-access proposal before the end of this month, and then revisit the issue to "fix" the proxy access rules in 2008. I am troubled and concerned by this process and rush to a decision which at the outset is acknowledged to be flawed. During the 2007 proxy season, only three proxy access shareholder proposals were filed on corporate ballots to adopt bylaw amendments regarding the election of directors. The expectation is that only a handful will be filed in 2008. Thus, given the small number of resolutions expected in this area, it is highly unlikely that those resolutions will create any widespread uncertainty. Furthermore, as we all know, it is hard to undo rules once they are adopted. There are far more serious consequences for the Commission to enact one set of rules now and then basically go back to the drawing board within months of acting. This will cause far more uncertainty and confusion and will result in public companies having to comply with three different regulatory schemes in two years. The Commission should take its time and get it right once and for all with the benefit of a full complement of Commissioners to consider the issue.

Clearly, there are many issues that I hope we have an opportunity to discuss this morning. There are certainly some positive trends such as a movement by many U.S. companies to adopt majority voting in director elections, and some companies like AFLAC whose board approved a resolution giving shareholders the right to a non-binding vote on executive compensation. Nevertheless, we need to do much more to bring shareholder rights in alignment with international best practices. And, given what we've seen in the Enron, WorldCom, stock options backdating and executive pay scandals, it seems a sensible idea that long-term investors should have a way to nominate genuinely independent directors to corporate boards. A company that delivers long term shareholder value should expect the ongoing support of its shareholders. Shareholder access to the proxy should not be viewed as seeking to place new burdens on business but as a way to ensure accountability and responsibility by both the shareholders and management. Ultimately, this is an opportunity for the Commission to lead and show the world that it takes shareholder rights and investor protection seriously.